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Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: The Phoenix Group

File: B-250074.2; B-250074.3; B-254015; B-254015.2

Date: November 4, 1993

Jacob B. Pompan, Esq., Pompan, Ruffner & Werfel, for the protester.

Demetria Carter, Esq., and Victoria D. Heiden, Esq., Department of the Navy, for the agency.

Daniel I. Gordon, Esq., and Paul Lieberman, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest challenging contract award which was suspended by the agency is dismissed as academic.
2. Protest allegation that agency canceled solicitation without justification is denied where protester fails to rebut agency's explanation for its action.

DECISION

The Phoenix Group protests the cancellation of request for proposals (RFP) No. N00600-92-R-2598, and the terms of RFP No. N00600-93-R-0245, issued by the Department of the Navy in a procurement for technical support services. Phoenix also challenges various agency actions undertaken during the course of the procurement.

We dismiss the protests in part and deny them in part.

The Washington Navy Yard Naval Regional Contracting Center issued RFP No. N00600-92-R-2598 on May 5, 1992, to obtain proposals for support services to operate and maintain certain transmitters and associated antennas in Hawaii and Guam. The RFP stated that the Navy intended to award a contract based on initial proposals without conducting discussions, but that the agency reserved the right to conduct discussions if the contracting officer determined them necessary. Award was to be made on the basis of the lowest priced, technically acceptable proposal.

The agency received nine proposals by the July 17, 1992, deadline for submission of initial proposals. In the evaluation of those proposals, Phoenix's was found unacceptable but susceptible of being made acceptable. Two proposals were found acceptable. Intelcom, whose proposal was the lower priced of those two technically acceptable proposals, was awarded a contract on August 14, 1992, without any discussions having been conducted.

On August 26, 1992, Phoenix filed a protest with our Office, alleging that its proposal was the lowest priced, technically acceptable offer and that award to Intelcom was therefore improper. On the same day, another unsuccessful offeror sent the agency a letter alleging that Intelcom's proposal was technically unacceptable because it failed to satisfy one of the RFP staffing requirements.

As a result of this other offeror's letter, the contracting officer reviewed Intelcom's proposal and concluded that it was, in fact, noncompliant with an RFP staffing requirement. Accordingly, on September 3, the agency decided to suspend Intelcom's contract, conduct discussions with offerors whose proposals were in the competitive range, and then make award on the basis of the lowest priced, technically acceptable proposal. On September 4, the agency signed an agreement with the protester, in which Phoenix agreed to withdraw its protest and the Navy agreed to reopen the competition and to include the company's proposal in the competitive range. Phoenix also agreed that the agency would have to have an interim, sole-source contract with Intelcom during the ongoing competition for a full-term contract. On September 29, a competitive range was established, which included all of the nine proposals which had been received.

On the basis of the agency's urgent need for the uninterrupted provision of the operation and maintenance services covered by this procurement and the unavailability of the prior incumbent, the agency issued a justification and approval for award of a sole-source "bridge" contract to Intelcom. See 10 U.S.C. § 2304(c)(2) (1988). That award was made on September 30, initially for 2 months; the bridge contract was repeatedly extended by short increments as the competition for a full-term contract continued.

In October and early November 1992, written discussions were held with all offerors, including Phoenix. Revised proposals were due on November 6. Phoenix's revised proposal was again evaluated as technically unacceptable but susceptible of being made acceptable. After informing offerors, including Phoenix, of the results of the evaluation, the agency requested that best and final offers (BAFOs) be submitted by November 30, 1992. Phoenix's BAFO was again found technically unacceptable, but capable of

being made acceptable. A two-page list of deficiencies in that proposal was prepared by the agency.

In the course of the following months, the agency revised its requirements for the services covered by the procurement in light of the ongoing downsizing of the Navy. As part of that process, a revised acquisition plan was approved on February 11, 1993. Among other changes, that plan changed the basis of award from the lowest priced, technically acceptable proposal to the proposal offering the best value to the agency. The agency's written record explains that the government could benefit from offerors being permitted to use their technical expertise to propose higher quality solutions, even if they bore a higher price.

After repeated delays, the agency issued amendment No. 0008 to the RFP on June 21, 1993. The amendment revised some of the technical requirements and removed others, and changed the award criteria as explained above. The amendment included a revised solicitation package, which replaced the previous package in its entirety. This revised solicitation bore the number N00600-93-R-0245, but was identical to the original solicitation, except for the revisions noted above.

Phoenix challenges the propriety of the August 14, 1992, award to Intelcom on the basis of alleged deficiencies in various internal agency approval documents. Phoenix contends that its agreement to withdraw its August 26, 1992, protest was obtained unfairly, with the government taking advantage of the fact that Phoenix was not represented by counsel at that time. Further, Phoenix alleges that, because of the deficiencies in the award of the initial contract, the interim contract to Intelcom was also improper. Finally, Phoenix contends that the agency's issuance of amendment No. 0008 amounted to the cancellation of RFP No. N00600-92-R-2598, without adequate justification.

We dismiss the challenge to the award of the initial contract to Intelcom. The agency recognized that its award was improper because Intelcom's proposal failed to satisfy one RFP staffing requirement, and the agency took corrective action by suspending that award and reopening the competition. Since the agency action rendered Phoenix's August 26, 1992, protest academic, it would have been dismissed by our Office, if the protester had not voluntarily withdrawn it. See East West Research Inc.-- Recon., B-233623.2, Apr. 14, 1989, 89-1 CPD ¶ 379. There is no reason for our Office to consider the propriety of the initial award to Intelcom now, where the agency suspended that award more than 1 year ago. Accordingly, we dismiss

Phoenix's objections to the initial award, and to the agreement with the agency leading to the withdrawal of the August 26 protest, as academic.

As to the bridge contract to Intelcom, essentially Phoenix's only ground for challenging that contract is that "all awards that flowed from [the initial and allegedly improper Intelcom] award are improper." This does not state a basis for protest. Phoenix does not meaningfully challenge the urgency of the agency's need, the lawfulness of the justification and approval for the agency's sole-source award, the agency's rationale for award to Intelcom, or any other specific aspect of the award. Accordingly, we dismiss this issue for failure to state a valid basis of protest.

Concerning the issuance of amendment No. 0008, the parties disagree about whether the initial RFP was actually canceled (as the protester alleges), or merely renumbered (as the agency contends). This dispute has no bearing on the propriety of the agency's action. The only question is whether the revised terms of the solicitation, and in particular the changes to the award criteria, reasonably reflect the agency's needs. While the protester contends that they do not, it has failed to rebut the specific explanation offered by the Navy. See Superior Eng'g and Elecs. Co., Inc., B-237035, Dec. 20, 1989, 89-2 CPD ¶ 574.

In particular, the protester's contention that the agency adopted a "best value" award criterion to avoid making award to Phoenix has no basis in the record. That contention was presented in the initial protest at a time when the protester appears to have believed that its offer was the lowest priced, technically acceptable proposal (thus permitting the argument that, but for the change to the award criterion, Phoenix's proposal would have been in line for award). Once it became clear from the record that Phoenix's proposal was not the lowest priced, technically acceptable offer, the allegation was rendered wholly unsupported. Similarly devoid of support is the statement in Phoenix's protest that "it is difficult to believe that

¹Phoenix also complains of the agency's failure to establish a competitive range prior to the initial award. Although this contention is also dismissed as academic, we note that competitive ranges are established for the purpose of conducting discussions, and the initial award was made (consistent with the RFP) without discussions, hence no competitive range needed to be established at that time. See Federal Acquisition Regulation § 15.609(a).

Intelcom did not have a hand in the design of the evaluation criteria under [amendment No.] 1115." Accordingly, we deny these grounds of protest.

The protests are dismissed in part and denied in part.


James F. Hinchman
General Counsel